UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE BOEING COMPANY

and

SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE, IFPTE, LOCAL 2001, ALF-CIO

Case: 19-CA-128941

CHARGING PARTY'S BRIEF IN OPPOSITION TO RESPONDENT/EMPLOYER'S EXCEPTIONS

Thomas B. Buescher
M. Jeanette Fedele
Buescher, Kelman, Perera & Turner, P.C.
600 Grant St., Ste. 450
Denver, CO 80203
Attorneys for SPEEA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule and Regulations

I. INTRODUCTION

Charging Party, the Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001 (SPEEA or "the Union"), submits this brief in opposition to the Exceptions to the Decision of Administrative Law Judge Dickie Montemayor ("ALJ") filed by the Respondent/Employer, The Boeing Company ("the Company" or "Boeing") in Case No. 19-CA-128941. SPEEA is a labor organization within the meaning of Section 2(5) of the NLRA.

The Exceptions filed by the Company must be denied in their entirety as the ALJ's factual findings and conclusions of law sustaining the charges filed by SPEEA, and his determinations that the Company committed the unfair labor practices alleged by the General Counsel, are amply supported by the evidentiary record and existing law. Specifically, the ALJ correctly found that (i) all the information requested in SPEEA's March 27, 2014 Information Request (hereinafter the "Request" or "SPEEA's Request") was presumptively relevant (ALJD 10), (ii) the Union's demonstrated bases for relevancy was not limited to effects or decisional bargaining, but also included information relevant to the union's role as exclusive collective-bargaining representative (ALJD 10:27-31 & 10:37-46); (iii) Boeing's offer to produce information responsive to part 1(e) of the Request, but failure to do so, violated the Act; (iv) Boeing failed to meet its burden of establishing its defenses and Boeing was not otherwise excused from producing responsive materials; and (v) Boeing failed to meet the high burden of showing a clear and unmistakable waiver.

In further support of its opposition to Respondent's Exceptions, and in addition to the presentation of facts and arguments set forth below, SPEEA respectfully refers the Board to the answering brief and supporting papers filed by the Counsel for the General Counsel.

II. STATEMENT OF FACTS

The recitation of facts by the General Counsel is sufficient for the Board's analysis. While Boeing's "Factual Background" argues and takes issue with the ALJ's credibility assessments and the weight given to certain pieces of evidence, the findings of the ALJ were correct. The Company does not point out any genuine factual disputes. SPEEA objects to Boeing's interpretation of the parties' CBA and urges the Board to rely instead upon its independent assessment of the contract.

As to the information shared at the JWC meetings, Boeing's own witnesses established that the presentations to the JWC members were only the tip of information iceberg. Ms. Marx testified that the studies Boeing conducted were not part of presentations, and that the presentations given at JWC meetings did not represent all of the documentary information that Boeing had related to the Company's work relocation analyses. (Tr. 116:7-117:16) Similarly, while struggling to articulate what a "study" was, Mr. Zarfos' failure to directly answer the question posed by Boeing's counsel indicated that the pages presented at the JWC meeting did not comprise the whole of any "study" being conducted by Boeing.[1] (Tr. 140:24 – 141:6)

III. RESPONSE TO BOEING'S "STATEMENT OF ISSUES"

Boeing essentially complains of alleged errors in the ALJ's findings on relevance ("sub-issue" 1(a), (b), and (f)), and Boeing's defenses (1(c) - (e)), and whether there was waiver by SPEEA (2). Boeing's "sub-issues" 1(a), 1(b), and 1(f) address Boeing's mischaracterization or misinterpretation of the ALJ's decision. These "sub-issues" do not comply with Board Rule and Regulation 102.46(b)(1)(ii) and (iii). As THE sub-issues do not except to language in the actual

[1] Mr. Zarfos' testimony regarding LOU 6 is not at all material to the SPEEA Request currently in dispute. The instant ULP matter concerns movement of bargaining unit work to other Boeing employees, not use of non-union labor.

text of the ALJ's Decision, it is unclear how Boeing intends these exceptions. Accordingly, SPEEA treats them as exceptions to the ALJ's findings on relevance. SPEEA urges the Board to reject Boeing's fictional account of the ALJ's decision[2] and review exceptions 1(a), (b), and (f) as addressing relevance.

Also, SPEEA notes that Boeing's brief misstates the verbiage of the Information Request, and requests the Board disregard Boeing's representation of the Request as it appears on page 14 of the Company's brief, and refer instead to the original, at GC Ex. 6.

IV. ARGUMENT AND AUTHORITIES

A. Boeing violated the Act by agreeing, but then failing, to respond to part 1(e) of the Request

Boeing couches its exceptions and argument on the premise that the Company should not be found to have violated the Act as to <u>any</u> portion of the Request. However, the evidence reveals that Boeing engaged in a blatant and *per se* violation of the Act as to subpart 1(e) of the Request.[3]

While generally resisting SPEEA's information request, Boeing's initial March 2, 2014 response by Ms Marx stated, without conditions, that:

> The Company will provide documents relating to meetings it has held with SPEEA-represented employees regarding the relocation of SPEEA-covered work**.**

(GC Ex. 7) While Ms. Marx goes on to invite the Union to identify specific meetings, her letter states this was merely for the purpose of facilitating a prompt response. *Id*. On April 30, 2014, Boeing offered to provide information necessary to engage in effects bargaining and reiterated its

[2] Boeing's "interpretation" only underscores the ALJ's finding that Boeing engages in "semantic gamesmanship."

[3] To the extent Boeing claims any of its defenses apply to this clear violation, SPEEA addresses them in Section IV.B. of this brief.

commitment to providing documents relating to the relocation meetings. (GC Ex. 9) However, Boeing failed to follow through on its commitment; Sean Leonard testified that Boeing did not provide information responsive to SPEEA's request. (Tr. 54:8-10) No witness for Boeing testified to the contrary regarding the materials promised in Ms. Marx' April 2 and April 30 letters.

Boeing cannot dispute the relevancy of documents it offered to produce. The Board has held that "an employer's unreasonable delay in furnishing information 'is as much of a violation of the Act as a refusal to furnish the information at all.'" *Salem Hosp. Corp.*, 359 NLRB No. 82, 2013 NLRB LEXIS 195, at *10 (2013)[4] (citing *American Signature*, 334 NLRB 880, 885 (2001)); *Lenox Hill Hosp.*, Case No. 02-CA-103901, 362 NLRB No. 16 slip op., at 7 (2015) (citing *Woodland Clinic*, 331 NLRB 735, 736 (2000)). While Boeing did not outright refuse to produce information necessary for effects bargaining or regarding the relocation meetings, its failure to have done so by the time of hearing ten months after the request constitutes a *per se* violation of the Act. Accordingly, Boeing has no basis for excepting to the ALJ's Decision as to subpart 1(e) of the Request and Board must uphold it.

B. **Boeing's first argument is a red herring; regardless of Boeing's misreading of the Decision, Board law is clear that materials concerning exploratory or prospective business decisions are *per se* relevant**

Boeing incorrectly construes the ALJ's Decision to impose a limitation on SPEEA's Request. Boeing's Brief in Support of Exceptions (hereinafter "Co. Br.") 20-25. Having "rewritten" the Request, Boeing argues, the ALJ allegedly narrowed the Request to apply only to decisions Boeing had already made or plans that Boeing was implementing. (Co. Br. 20) Boeing's exceptions do not satisfy Rules and Regulation 102.46(b)(1)(ii) and (iii) because

[4] Affirmed by 201 L.R.R.M. 1889 (2014).

Boeing did not and, indeed, cannot cite to any sentence in the Decision that supports Boeing's radical presumption that the ALJ "rewrote" the Request to narrow its scope. *See* Boeing's Exceptions Nos. 1, 2, 11, 12, 13, 15, 16, 20, and 51.[5] Boeing's argument lacks merit. Ultimately, information about Boeing plans to relocate work – whether in the preliminary or implementation stages – is relevant and discoverable under the Board's broad relevancy standard.

1. Applicable standard of relevance in information requests

An employer has an obligation under Section 8(a)(5) of the National Labor Relations Act (the "Act") to furnish its employees' collective bargaining agent with information requested for and relevant to the union's proper performance of its collective-bargaining. *Leland Stanford Junior Univ. & Serv. Employees Local No. 715*, 262 NLRB 136, 138 (1982) (citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Truitt Mfg., Co*., 351 U.S. 149 (1956); *San Diego Newspaper Guild, Local No. 95 v. NLRB*, 548 F.2d 863, 866-67 (9th Cir. 1977)). "The employer's obligation applies with equal force to information which is relevant to the union's responsibility to administer and enforce provisions of existing collective-bargaining contracts." *Id*. "**This obligation covers information that is relevant to bargaining over the effects of a relocation of unit work**." *Comar, Inc.*, 339 NLRB 903, 912 (2003) (citing *Sea-Jet Trucking Corp.*, 327 NLRB 540 (1999) (emphasis added). **Even where the employer is not required to bargain about the decision to relocate unit work, the employer has an obligation** to provide the union with information about the transfer of unit work. *North Star Steel*, 347 NLRB 1364, 1368 (2006) (emphasis added).

[5] Boeing also excepted that the ALJ found SPEEA was entitled to all the information sought. Boeing's Exception No. 44 exposes the frivolity of Boeing's misreading of the ALJ Decision and reveals the Company understood the ALJ's holding to apply to SPEEA's Request in its entirety, and not just to "decisions already made by Boeing."

"As long as the information is relevant to the union's collective-bargaining responsibilities when viewed in light of all the circumstances of the case, the employer's refusal to furnish it constitutes a violation of Section 8(a)(5) . . . regardless of his good or bad faith." *Leland Stanford Junior Univ., supra,* at 138.[6] Information requests seeking information pertaining to employees within the bargaining unit is presumptively relevant and the employer must provide the information. *Prime Healthcare Centinela, LLC,* 2013 NLRB LEXIS 244 (2013) (citing *Disneyland Park,* 350 NLRB 1256, 1257 (2007)).

Even when a union seeks non-bargaining unit information, the burden of establishing relevance is minimal. In this matter, Rich Plunkett's letters (GC Exs. 6 & 8) amply meet the low threshold for relevancy. In determining whether the information is relevant, the ALJ need only find a "probability that the desired information [is] relevant, and that it would be of [use] to the union in carrying out its statutory duties and responsibilities." *Piggly Wiggly Midwest LLC,* 357 NLRB No. 191, 2012 NLRB Lexis 9, at *74 (2012) (quoting *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967)); *accord San Diego Newspaper Guild, Local No. 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977). "The sought-after evidence need not be necessarily dispositive of the issue between the parties but, rather, only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities." *Washington Beef, Inc.*, 328 NLRB 612, 618 (1999) (citing *inter alia*, *Pfizer, Inc*., 268 NLRB 916, 918 (1984)). "Relevancy should be broadly construed and absent any countervailing interest, any requested information that has a bearing on the bargaining process must be disclosed." *AFL Quality NY*, 196 L.R.R.M. 1828, 2013 *NLRB LEXIS* 142, *21-22 (Apr. 16, 2013) (emphasis added) *adopted by* 2013 *NLRB LEXIS*

[6] *Citing Puerto Rico Telephone Co. v. NLRB*, 359 F.2d 983, 986 (1st Cir. 1966); *Curtiss-Wright Corp., Wright Aeronautical Div. v. NLRB*, 347 F.2d 61, 67-69 (3d Cir. 1965); *J.I. Case Co. V. NLRB*, 253 F.2d 149, 152-153 (7th Cir. 1958); also, *Emeryville Research Center, Shell Development Co. v. NLRB*, 441 F.2d 880, 886-887 (9th Cir. 1971); *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962).

250 (2013). Further, necessity is not a guideline itself but, rather, is directly related to relevancy, and only the probability that the requested information will be of use to the labor organization need be established. "A union has satisfied its burden when it demonstrates a reasonable belief supported by objective evidence for requesting the information." *United States Testing Co.*, 324 NLRB 854, 859 (1997) (citing *Knappton Maritime Corp*., 292 NLRB 236, 238-239 (1988) and *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994)).

Here SPEEA sought the information not purely for purposes of (i) determining whether Boeing's plans were subject to decisional bargaining, but also to (ii) evaluate whether to request effects bargaining, (iii) assist bargaining unit members with planning for possible layoff, and (iv) help alleviate the uncertainty, confusion, and fear generated in the bargaining unit by Boeing's abrupt work relocation announcements.[7]

2. Boeing's exceptions are not based upon the ALJ Decision

Nowhere in the ALJ's Decision does it state that the "Request was limited to decisions already made by Boeing to move bargaining unit work." In support of its flawed reading of the Decision, Boeing points to a solitary sentence in the 15-page decision. In doing so, Boeing asks the Board to err by ignoring that the ALJ found the information sought in all subparts of the Information Request was presumptively relevant.[8] (ALJD 13:39-40; Boeing Exception No. 44) Rather than limiting SPEEA's Request the ALJ acknowledged that Union cast a "wide net" and that "SPEEA request was aimed as discovering all relevant information related to the movement of work." (ALJD 12:8-9) Notably, the Decision did not narrow the scope of either the Union's Request or the remedy, which was for Boeing to respond to the Request in its entirety.

[7] The record shows that the notice Boeing gave SPEEA that it was implementing work relocation, and the related lay-off, plans was measured in minutes (Tr. 29) not the "months, if not years" that Boeing suggests.

[8] Boeing's bifurcation of "actual" and "potential" work movement is neither material nor dispositive.

Boeing's misinterpretation Decision stems from reading page 11, lines 19-20 of the ALJ's decision in isolation. The decision read as a whole reveals that this particular finding was based upon the [ALJ's interpretation of the] evidence that:

- "SPEEA officials asked [at a February 2014 meeting] if Boeing was planning on making any other announcements regarding the relocation of work similar to that made in December." (ALJD 5:29-31) (citing Tr. 39), and that
- "Todd Zarfos, the vice president for engineering for the Washington State Design Center and senior chief engineer for systems for Boeing Commercial Airplanes responded directly that they would continue to see these types of studies and movement impacting the Puget Sound work force. (ALJD 33-35) (emphasis added)

Read in its entirety, the Decision reveals that the ALJ found that Boeing – as admitted by its VP Zarfos – intended to continue movement of work that would impact the Puget Sound work force. (ALJD 11; *see also* Tr. 148) This, the ALJ found, was "sufficiently concrete" evidence that Boeing had made an overarching decision to move work. The ALJ did not find that Boeing had made a specific and final decision about each and every potential work movement being studied. However, the ALJ found that actions such as the moving of 1000 jobs in December (ALJD 11:17-19) combined with another work relocation announcement in April 2014 and Zarfos' statement that SPEEA would continue to see the same kinds of studies and work movement (Tr. 148:14-18) was "sufficiently concrete" evidence that Boeing had made an overall decision to move SPEEA-represented work from the Puget Sound. Moreover, the ALJ's Decision provides other distinct bases for ordering full compliance with SPEEA's Request, which this brief will address further below.

Where the ALJ's Decision uses the word "decision" in a macro sense, Boeing apparently interprets the word as relating to the micro-level of Company decision making. Boeing apparently argues that unless the ALJ specifically found Boeing had made a decision about each and every potential work movement it was examining, we must assume the ALJ "rewrote" the Request to limit its scope. Such argument has no support in the Decision. Furthermore, Board law consistently permits discovery of information concerning potential and possible work relocation plans.

If the ALJ had meant to narrow the scope of the Union's Request, he would have expressly done so. No part of the Decision addresses or indicates that the ALJ is limiting or modifying SPEEA's Request in any way. To the contrary, the ALJ ordered Boeing to comply with full discovery of items 1(a) through 1(f) of SPEEA's Request. (ALJD 13:39-40)

Given Board law in this area, Boeing's misconstruction of the Decision is immaterial. The Board recognizes that relocation is subject to decisional bargaining if the employer is motivated by labor costs. *See NLRB Office of the General Counsel*, Case No. 32-CA-16227, 1998 NLRB GCM LEXIS 53, at *11-12 (May 21, 1998) (citing *Dubuque Packing*, 303 NLRB 386 (1991) *enf'd* 1F.3d 24 (D.C. Cir. 1993)). For instance, in *Galicks, Inc.*, the Board recognized that the employer was obligated to provide information about future work projects because it related to whether there would be work for the unit members. 354 NLRB 295, 310 (2009) *enf'd NLRB v. Galicks, Inc.*, 671 F.3d 602 (6th Cir. 2012). In *Litton Microwave Cooking Products*, the Board upheld ALJ's decision that the employer was obligated by the Act to produce exploratory or prospective materials such as feasibility studies. In that case, the Board held that the Respondent could not "escape its obligation to provide relevant, available information which would have allowed the Union to understand and discuss intelligently the

relocation issues" where the union sought copies of feasibility studies and other analyses, surveys, or studies which dealt with the relocation or transfers of work from one plant to another location. 283 NLRB 973, 974-975 (2001). *See also North Star Steel, supra* (employer obligated to provide information regarding transfer of unit work); *E.I. du Pont Nemours & Co.*, 346 NLRB 553, 578 (2006) (information regarding employer's "transformation plan" that had potential to cause layoff of unit employees presumptively relevant); *Whitehead Bros. Co*., 263 NLRB 895, 900 (1982); *Safeway Stores*, 252 NLRB 682, 685-686 (1980).

Boeing argues it is "common sense" that it is not obliged to respond to an information request it never received or was communicated to it. However, there is no dispute that Boeing received SPEEA's Request (Tr. 96:17-97:4). And Board law places the burden on seeking clarification on the responding party. Had Boeing been concerned about over breadth of the request or confused over what kind of materials, exactly, SPEEA sought, Boeing had the duty to inquire. *Superior Protection, Inc.*, 341 NLRB 267, 269 (2004), *enf'd* 401 F.3d 282 (5th Cir. 2005). If an employer believes a request is ambiguous or overbroad, it must seek clarification or comply with request. *Id*. Boeing's misguided notion of "common sense" cannot be substituted for Board law.

As their exclusive representative, SPEEA owes a duty to bargaining unit employees to evaluate whether to engage Boeing in negotiations over mandatory subjects of bargaining, including, in circumstances where labor costs is a factor, work relocation decisions, and potential layoffs. The information SPEEA sought, for instance the work-relocation studies Boeing conducted, is necessary for SPEEA to determine if the circumstances were such that SPEEA should engage in decisional bargaining. *See Dubuque Packing*, *supra*; (Tr. 43, 44, 51). Even if

Boeing's studies, planning documents, or "Operation Dragonridge"[9] files did not reveal labor costs to be a basis for its relocation decision, the Company would still have to comply with SPEEA's request for information. **"[A]n employer's obligation to provide a union with requested information about it does not depend on whether the employer is also found to have had an obligation to bargain about the transfer of particular unit work**." *North Star Steel, supra*. For instance, the information SPEEA requested about work relocation is necessary in order for them to determine whether to engage in effects bargaining[10] (*Las Vegas Sands,* 324 NLRB 1101, (1997) and, if so, to supply SPEEA with information necessary engage in meaningful effects bargaining (*Gitano Group, Inc.*, 308 NLRB 1172, 1172 & 1184 (1992)). The burden, therefore, was on Boeing to rebut the presumption of relevance. Contrary to raising a rebuttal, Boeing offered to "engage in such discussions [regarding effects bargaining] and to provide information reasonably necessary to effectuate them" (GC Ex. 9), effectively conceding relevance.

Notably, sections A.1 and A.2 of Boeing's brief lack citation to any authority. Having focused its energy on parsing a single sentence in the Decision, the Company appears to have overlooked the fact that Board law supports SPEEA's Request for information about not only actual, but prospective, work relocation decisions.[11]

---

[9] Part 1(f) of the request relates to SPEEA's discovery of a series of undisclosed Boeing plans to move SPEEA-represented work outside of SPEEA's jurisdiction in the Puget Sound area. SPEEA's knowledge of the rumors concerning these code names included learning that one of the code names for a yet-to-be-announced work relocation is "Operation Dragonridge." (Tr. 88:17-89:8. *See also* Tr. 91:14-24; 100:1-6) Boeing may actually be using the term "Project" instead of "Operation" in their code names – as shown by the name "Project Neptune in Respondent's Exhibit 9.

[10] Having knowledge regarding prospects for recall or rehire, as well as opportunities for unit members to transfer to or be hired on at the relocated work sites are data points SPEEA would need to consider in determining whether to engage in effects bargaining.

[11] Boeing's assertion that it gave the Union notice "months, if not years" in advance of any decision to relocate bargaining unit work is highly misleading, if not frank misrepresentation. *See* SPEEA's post-trial brief to the ALJ (hereinafter "Union Br."), p. 15; Tr. 29, Tr. 116:7-117:16; Tr. 140:24 – 141:6; Tr. 125:20-22. To suit its purposes Boeing alternately argues that it hasn't made work-movement decisions, but then claims it gave SPEEA

The argument Boeing presents at section A.2, pages 24 and 25, of its brief is perplexing. Boeing claims that the ALJ ordered Boeing to produce information the Union did not request. As discussed above, there was no "rewrite," limitation, or modification of the Request ordered by the ALJ.[12] The ALJ ordered production of information responsive to SPEEA's March 27, 2014 information request, which Boeing received. (Tr. 96:17-97:4) Boeing's argument here is, at best, frivolous.

C. **The ALJ properly found that Boeing failed to adduce evidence to support its defenses**

In section "B" of its brief, Boeing appears to claim it is addressing its defenses. However, its first such argument claims alternatively and incorrectly that (i) a Union cannot demonstrate the relevance of requested information unless there is a duty to bargain regarding the particular subject, and (ii) employers have no obligation to engage in decisional or effects bargaining until the employer desires to implement a decision. Boeing's arguments not only ignore Board law, they are also based on highly distinguishable opinions.

1. <u>Relevancy extends to information needed to allow the Union to perform its representative functions; it is not limited to mandatory subjects of bargaining</u>

Though addressed in SPEEA's post-trial brief, Boeing fails to acknowledge on-point Board law holding that the obligation to provide information is not based solely on whether there is an obligation to bargain over the subject of the information requested or the actions of the employer that caused the information to be protected. *See, e.g., North Star Steel*, 347 NLRB 1364, 1368 (2006) (Even where the employer is not required to bargain about the decision to

---

notice of all its decisions. Boeing can't have it both ways.

[12] Similarly, SPEEA objects to Boeing's mischaracterization of the trial transcript. Citing solely its witness' testimony, Boeing overreaches with its claim that the nature of Operation Dragonridge is undisputed. Rather, Sean Leonard testified that SPEEA did not specifically know what Operation Dragonridge was because Boeing had not responded to its Request. SPEEA understood that it was related to plans to relocate work. (Tr. 88-89) Further, Boeing did not ask Leonard whether Operation Dragonridge referred to a specific plan or overarching plan; Boeing's failure to develop the record on this point does not equate to an undisputed fact.

relocate unit work, the employer has an obligation to provide the union with information about the transfer of unit work."); *Leach Corp.,* 312 NLRB 990, 996 (1993); *Markle Mfg. Co. of San Antonio,* 239 NLRB 1142, 1146 (1979); *NLRB v Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965) *enf'g*. 145 NLRB 152 (1963); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). *See also, Shell Oil Co.*, 190 NLRB 101 (1971).[13]

The April 11, 2014 letter to Ms. Marx (GC Ex. 8) shows that the potential use of the information in either decisional or effects bargaining was only part of the reason for the request. The information was also needed to allow SPEEA to perform its representative function to "assist members in planning for potential layoff or other impacts on their careers." Mr. Leonard's testimony is the same. (Tr. 44-45, 51-52)

2. Compelling factual distinctions undermine Boeing's reliance on *Valley Mould*

Boeing relies heavily upon the *Valley Mould & Iron Company*[14] decision. However, *Valley Mould* is factually distinct from this case. *Valley Mould* dealt with allegations that, during contract negotiations, the employer concealed information regarding the impending layoff of six positions. While news of the layoffs did not occur until weeks after the CBA was executed, the General Counsel argued that the Company had formed the intention to eliminate the jobs at or prior to the time of bargaining. During the course of collective-bargaining negotiations, Valley Mould at no time expressed an intention to effect job terminations or layoffs in the future. The sole evidence proffered to establish that the company had formed a prior intention to eliminate the six positions was the remark of a company representative during a grievance meeting some two months after the contract negotiations. At the grievance meeting the Union asked "if these jobs [the laid-off positions] were being done, who was doing them, was there some reason for

[13] The Union's brief discusses these cases in greater detail in section IV.E. below.
[14] 226 NLRB 1211 (1976).

[the company] eliminating these jobs and did [the company] decide on that date at the end of May that they were going to eliminate these jobs." The company's director of labor responded that said "it [layoffs] had been in the wind since January of 1976 (sic)[15]." But that at the time he was not prepared to answer the Union's questions. *Id.* at 1212. The ALJ found that this evidence failed to show by a preponderance of the evidence that the company "***had formed an intention*** to eliminate the six classifications" at the time of or before the contract negotiations. *Id*. at 1213 (emphasis added).

It is key to note that even *Valley Mould* does not support Boeing's position that relevant information is limited to decisions that Boeing had already decided to implement. The issue in *Valley Mould* was whether the company had "formed an intention" to eliminate jobs and, therefore, concealed information, not whether it had already decided the particulars of how many, when, and how. The *Valley Mould* decision does not stand for the proposition that a decision to eliminate or move work must be at the implementation stage to warrant discovery of information. Rather, it simply holds that a generalized sense that layoffs are "in the wind," particularly when the employer's economic troubles are known to all, is insufficient to find that an employer consciously concealed relevant information.

In stark contrast to the *Valley Mould* case, here Boeing had been presenting, in general terms, plans to realign several Major Business Organizations in the months before SPEEA's Request. *See* GC Exs. 4 & 5; R Exs. 1-6. The record reveals that the "realignment" presentations made to the Joint Workforce Committee in the July to November 2013 time period were followed by an abrupt announcement in December 2013 that Boeing was relocating work for the BR&T organization, which would result in the layoff of several hundred SPEEA-represented employees (Tr. 26:25-29:7)

[15] It appears from the context, this should have read "1975."

Unlike the employer in *Valley Mould*, when asked by the Union about the likelihood of future work relocations, Boeing answered directly and in the affirmative. Boeing's VP, Todd Zarfos testified as follows:

> Q: Okay. Was there -- did SPEEA raise any questions about additional work moving out of Puget Sound at the February 27 meeting?
>
> A: *Yes they did.*
>
> Q: What do you recall?
>
> A: *I recall that, under hot topics, I think we were talking about some of the -- some of the BR&T in particular, I think the timing was. And then somebody asked -- I can't recall who, I think it may have been Rich Plunkett, but I'm not positive -- asked about, "**Well, are we going to continue to see this type of -- you know, these studies and movement impacting the Puget Sound workforce?" And I responded that we would.***

(Tr. 148:7-18) (emphasis added) In April, less than a month after receiving the Request, Boeing announced it would be moving more work to Southern California. Once again, Boeing made the announcement to SPEEA at virtually the same time it announced the work relocation to employees. (Tr. 50:12-51:25)

SPEEA demonstrated by a preponderance of the evidence that Boeing had formed an intention to move work out of the Puget Sound area. Maybe Boeing had not made all the logistical decisions inherent in <u>implementing</u> plans to relocate and layoff hundreds and thousands of more SPEEA-represented employees. Yet, the plans were sufficiently concrete to raise issues of significant representational duties such as those related in Mr. Leonard's testimony. (Tr. 50-51) Boeing is rather flip about thousands of individuals losing their jobs to equate such evidence to the "in the wind" evidence presented in *Valley Mould*.

3. Boeing's decisional and effects bargaining arguments are unavailing

Boeing devotes pages 27 and 28 of its brief to discussing a series of cases concerning the appropriate timing and notice for effects and decisional bargaining. Boeing's examination of the effects bargaining cases ignore both that (i) as of the date of the Request, there was a work relocation announcement affecting 1,000 jobs in BR&T over which SPEEA may have needed to evaluate effects bargaining, and (ii) effects bargaining is neither the sole basis for the information's relevance nor the sole purpose of SPEEA's needing the requested information. Victim of its own chronic misstatements (or overstatements) of the record and authorities, Boeing failed to recognize, for instance, that the *Willamette Tug & Barge Company*[16] case actually supports SPEEA. In *Willamette*, the Board held that the employer violated the Act when it presented the union with "a fait accompli concerning its cessation of operations and termination of employees" when it withheld from the union notification of such decision until the day of implementation. *Id*. at 282.[17]

Similarly, although not on point,[18] Boeing's citation to *Liquid Carbonic Corporation*[19] aids SPEEA, not Boeing. Boeing argues that *Liquid Carbonic* stands for the proposition that the "am employer's duty to bargain a decision arises only once it desires to implement it." (Co. Br. 28) Boeing's reading of the case may help explain why Boeing felt it was entitled to wait until the date of implementation (announcing the relocation to soon-to-be-laid-off employees in December 2013 and April 2014) before notifying SPEEA. However, it does not accurately represent the holding of *Liquid Carbonic*. Instead, the case holds that lack of notice prior to

[16] 300 NLRB 282 (1990).

[17] The Decision's analysis of adequate notice in the context of the sale of a business is not applicable to the present dispute.

[18] The *Liquid Carbonic* case, like the others cited at page 28 of Boeing's brief, addresses the adequacy of notice for decisional bargaining, not the relevancy of an information request or an employer's exemption from answering same.

[19] 277 NLRB 851 (1985).

implementation violates the Act.[20] Notice upon implementation does not constitute compliance with the Act. *Id*. at 864. Regardless, the analysis of adequate notice for decisional bargaining is not a stand-in for relevance of an information request, particularly where, as here, SPEEA had affirmation from the Company that more relocation announcements were imminent.

D. The ALJ properly found that Boeing failed to prove its defense that the Request was overly broad or burdensome

The evidence Boeing proffered for its untimely assertions of over-breadth and burden simply did not satisfy the Company's burden to prove its defenses by a preponderance of the evidence. Boeing did not, and cannot, argue that the ALJ overlooked any evidence on these defenses. Boeing did not cite any authority that would persuade the Board that the Company's sparse evidence met the preponderance standard. Rather, the Company simply takes issue with the ALJ's credibility assessment.

Finally, Boeing objects that the ALJ should have made drawn adverse inference because Rich Plunkett did not testify to rebut Mr. Zarfos' testimony. This argument ignores that Boeing bears the burden of proving its defense. The Company would have first had to establish sufficient evidence of its defenses for Mr. Plunkett's rebuttal, or lack thereof, to have any bearing on the ALJ's decision. As Boeing's proffered evidence came nowhere near meeting the Company's burden, there was no need for Mr. Plunkett to underscore, by his testimony, the insufficiency of Boeing's evidence.

1. Boeing failed to create a record concerning alleged burdensomeness

To prevail on objections that a request is overly broad or burdensome, a respondent must not only timely raise the objection, but also substantiate its defense.[21] *Salem Hosp. Corp.*, *supra*

[20] Again, this case addresses adequacy of notice, not the obligation to respond to relevant information request

[21] Boeing's brief also alleges the Request was "vague." However, Boeing failed to raise such an objection

at *12. "The fact that a union may ask an employer for a large volume of information does not, by itself, render that request overbroad so as to relieve the employer from the duty to provide that information" where, as here, the information is presumptively relevant *Id*. "There is no doubt that production of responsive information may impose strains on an employer, but that consideration does not outweigh the union's right to the information requested." *See id*. (citing *H.J. Scheirich Co.*, 300 NLRB 687, 689 (1990)).

Boeing's Complaints as to burden did not surface until trial. Boeing's April 2 and April 30, 2014 letters regarding SPEEA's information request never stated that Boeing believed the requests created an undue burden on the Company. Rather, this objection made its first appearance when Ms. Marx provided vague testimony that responding to SPEEA's request would be "very burdensome." It is well-settled that "[a]ny claim that documents cannot be produced or are too burdensome to be produced must be asserted and proven." *Lenox Hill Hosp.*, supra at 8. Boeing neither asserted nor proved its after-the-fact objection. Further, "[r]espondent must provide the information it its possession, make a reasonable effort to secure any unavailable information, and if any information remains unavailable, explain and document the reasons for its continued unavailability." *Lenox Hill Hosp.*, *supra* at 8.

Sean Leonard testified to his knowledge that Boeing never provided information responsive to SPEEA's request and Boeing's witnesses did not contradict this, other than to say that presentations at Joint Workforce Committee ("JWC") meetings should have sufficed. As for efforts to secure information, Ms. Marx testified that prior to her April 2, 2014 letter, she had made no effort to determine even basic information about what materials Boeing did offer to

---

at any time prior to its brief on Boeing's exceptions. A search of the trial transcript reveals the word vague was used only once – in an objection to a question posed by the General Counsel. (Tr. 112:24) Accordingly, Boeing waived any objection as to "vagueness."

provide ("[t]he effort I made was in writing the letter asking for more specificity from SPEEA.") (Tr. 115:21-116:1)

2. Boeing failed to adduce sufficient evidence that it sought clarification

There is no dispute that Board law places the obligation on the responding party that it sought clarification in an attempt to alleviate the burden of responding to an information request. Any evidence Boeing presented that it found the Request unclear or difficult to answer also shows that Boeing's witnesses kept such struggles to themselves and did not specify to SPEEA the nature of the Company's alleged quandary.

Rather than attempt to meet its obligations, Boeing attempted to shift its responsibilities back on SPEEA, insisting that the Union narrow its request or provide more specificity. There are at least two problems with this approach: (i) Boeing's April 2014 communications with SPEEA never asked the Union to narrow the information request nor does it ask the Union to provide any clarification other than to identify specific relocation meetings (if the Union had specific meetings in mind)[22] (GC Exs. 7 & 9) and (ii) Boeing was demanding of SPEEA the very same specificity SPEEA was attempting to discover. Ms. Marx complained she lacked the ability to respond to the request because she did not understand the timeline or the scope of the request. This was a critical part of the information SPEEA was attempting obtain – information about the timeline and scope of Boeing's potential work relocation projects. (Tr. 51:21-25) If Ms. Marx, in conjunction with Boeing's VP of Engineering, Todd Zarfos, could not identify documents responsive to a request for documents concerning "relocation and/or realignment of work currently being performed by SPEEA represented employees in the Puget Sound," how could SPEEA be expected to specify what studies or documents Boeing was relying upon to

[22] Rather, Boeing's April 2014 letters take issue with whether SPEEA was entitled to the requested data. (GC Exs. 7 & 9)

make the work movement decisions? Mr. Zarfos' testimony recounting his struggles with defining "relocation, realignment" (Tr. 154-155) exemplifies a prime opportunity wasted where Mr. Zarfos could have picked up the phone and called, sent an email to, or had a discussion with, Rich Plunkett to ask these questions. The record is devoid of such evidence.

Boeing's professed confusion about (i) what a "study" meant and (ii) the temporal scope of the request unnecessarily complicated SPEEA's straight-forward request and injected variables that were not part of the Union's request. Boeing cannot muddy the waters and then object that the issue was not clear. The fact is that Todd Zarfos understood what SPEEA was seeking. (Tr. 168:9-17, 170:14-171:16, 176:1-179:21 181:1-6) There is no contemporaneous evidence that Boeing had questions about temporal scope or existential doubts about what SPEEA meant by "studies." Even if Boeing genuinely held these concerns in the months after receiving SPEEA's request, Boeing failed to communicate them to the Union.

Boeing points to Mr. Zarfos' testimony he believed the Request was "insupportable" because, he speculated, it called for "hundreds and thousands of transactions" by individual managers. (Tr. 155-157) Yet the records reveals, and the ALJ correctly found, there is no evidence that Mr. Zarfos or anyone else with Boeing conveyed this concerns to SPEEA or suggested that in addition to "being struck by the breadth and scope of the request," the Request was also overly burdensome for Boeing.

Despite contrived excuses about not knowing how to go about fulfilling SPEEA's information request, Boeing had the knowledge to supply that data SPEEA was seeking (Tr. 171:3-16) Had Boeing been concerned about over breadth of the request or confused over what kind of materials, exactly, SPEEA sought, Boeing had the duty to inquire. *Superior Protection, Inc.*, 341 NLRB 267, 269 (2004), enf'd. 401 F.3d 282 (5th Cir. 2005). If an employer believes a

request is ambiguous or overbroad, it must seek clarification or comply with request. *Id*. Here, Boeing did neither.

3. Boeing's exceptions boil down to disagreement with the ALJ's credibility assessments

The record is what it is. Boeing did not suddenly turn up some new evidence that the ALJ missed. Rather, the Company simply takes issue with the ALJ's assessment of Mr. Zarfos' testimony. "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141, 141 n.1 (2014) (citing *Standard Dry Wall Prods.*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951)). The record shows that the ALJ's assessment is correct – Boeing's evidence was woefully insufficient to prove up its defenses.

E. **The ALJ properly found that Boeing failed to meet its high evidentiary burden; There was no clear and unmistakable waiver of SPEEA's right to information**

Boeing argues that its obligation to provide information is tied to the obligation of the employer to bargain over a subject and that SPEEA had waived its right to bargain over the movement of bargaining unit work. However, this position contradicts Board law and treats the obligation to provide information too narrowly. Regardless of whether SPEEA waived the right to engage in bargaining, it is entitled to the information.

1. The Board's broad relevancy standard is not limited to the mandatory subjects of bargaining

The obligation to provide information is not based solely on whether there is an obligation to bargain over the subject of the information requested or the actions of an employer that caused the information to be protected. "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the

proper performance of its duties. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149." *NLRB v Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). In *Leach Corp.*, 312 NLRB 990, 996 (1993), the employer argued that it had no obligation to recognize the union that requested information. The Board held: "Thus, even if the Respondent was correct about recognition issue, as the representative of the relocated employees the Union certainly had the right to have such information as would be necessary to perform its representative function. *E.g., Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965) *enf'g* 145 NLRB 152 (1963)." Similarly, *in Markle Mfg. Co. of San Antonio*, 239 NLRB 1142, 1146 (1979), the Board held:

> Although the collective-bargaining agreement had expired, the Union remained the duly designated collective-bargaining representative of the employees and as such was clearly entitled to this information to intelligently perform its representative functions. Likewise, the Union was entitled to a list of employees recalled from layoff and the positions to which they were recalled as requested in the March 14 and April 13, 1977, letters. The same is true with respect to the names of employees who did and did not receive a Christmas bonus. It is well settled that the requested information need only be of potential relevance to mandate an employer to provide it.

See also, Shell Oil Co., 190 NLRB 101 (1971).

The April 11, 2014 letter to Ms. Marx (GC Ex. 8) shows that the potential use of the information in either decisional or effects bargaining was only part of the reason for the request. The information was also needed to allow SPEEA to perform its representative function to "assist members in planning for potential layoff or other impacts on their careers." Mr. Leonard's testimony is the same. (Tr. 44-45, 51-52) Thus, whether SPEEA waived the right to engage in bargaining is immaterial.

2. Boeing failed to establish "clear and unmistakable" waiver

Under the Board's broad relevancy standard, SPEEA was entitled to the information sought in the Request even if it had waived bargaining. That said, SPEEA did not waive the right to bargaining. The law on waiver is well established.

> The Board requires a waiver of a union's statutory rights to be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); Timken Roller Bearing Co., 138 NLRB 15, 16 (1962). 'A clear and unmistakable waiver may be found in the express language and structure of the collective-bargaining agreement or by the course of conduct of the parties. The burden is on the party asserting waiver to establish that such a waiver was intended.' *Leland Stanford Junior University, supra* [307 NLRB 75, 80 (1992)]. *See also NLRB v. New York Telephone Co*., 930 F.2d 1009 (2d Cir. 1991), *enfg*. 299 NLRB 44 (1990); *United Technologies Corp., supra* [274 NLRB 504 (1985)].

Sho-Me Power Electric Coop., 360 NLRB No 53 slip op at 7, (2014). On August 24, 2015, the Board re-affirmed its "doctrine that a waiver of statutory rights is not to be lightly inferred but instead must be 'clear and unmistakable.'" *Chemical Solvents, Inc.*, 362 NLRB No. 164 (2015)

Nothing in the evidence about bargaining history supports a conclusion of "clear and unmistakable waiver" of SPEEA's right to the information. There is no evidence that entitlement to this kind of information was ever discussed and there has been no claim by Boeing that there is waiver language concerning information requests in the CBA. "Waiver of such rights may be evidenced by bargaining history, but only if the matter at issue has been fully discussed and consciously explored during negotiations and the union has consciously yielded or clearly and unmistakably waived its interest in the matter." *Ohio Power Co.*, 317 NLRB 135 at 136 (1995). See also *Boise Cascade Corp*., 279 NLRB 422, 433 (1986). The one time that SPEEA requested some changes to the contract in 2002 (R. Ex. 12, p.2) does not show this kind of "mutual understanding." In fact, even Mr. Zarfos characterized this proposal as an effort to

limit Boeing's ability to lay people off, not to limit SPEEA's right to information. (Tr. 165:11-24)

3. The ALJ properly saw through Boeing's attempt to expand the scope of Article 8.2

While Boeing's lengthy argument regarding waiver of bargaining rights is another red herring, the ALJ properly saw through it. Boeing's mistakes the scope of its management rights. The text quoted in Ms. Marx' April 30, 2014 letter (GC Ex. 7) comes from Section 8.2 of the Contract, and deals with workforce reductions not the relocation of workforce from union- to non-union facilities. This is a critical distinction. The jobs now being performed by SPEEA-represented employees are not being reduced, they are being relocated to employees in non-union facilities. Article 8, Workforce Administration, states its objective as follows:

> The general objective of the procedure stated in this Article is to provide for the accomplishment of **workforce reductions** for business reasons, to the end that, insofar as practicable the reductions will be made equitably, expeditiously, and economically, and at the same time will result in **retention on the payroll of those employees** regarded by management as comprising the workforce that is best able to maintain or improve the efficiency of the Company, further its progress and success and contribute to the successful accomplishment of the Company's current and future business.

(GC Ex. 1, Art. 8.2) (emphasis added) Article 8 sets out a detailed method for how Boeing makes workforce reduction decisions when the total amount of work is being reduced, not when the work is simply being transferred outside of the bargaining unit. (GC Ex. 1) Boeing explicitly stated that there was engineering work and that this work was, or is being, moved to other (non-bargaining unit) Boeing employees. (Jt. Ex. 1 ¶ 2) Boeing is not experiencing a reduction in the work to be performed; the work is still there. (*Id.*) As such, it is inaccurate for Boeing to characterize the situation here as an Article 8.2 workforce reduction.

Boeing's argument that it has sole discretion regarding **workforce reduction** has no bearing to the current matter, where Boeing is **relocating** the work previously done by SPEEA members to other locations outside of the Puget Sound area. Under the *Dubuque*[23] analysis, Boeing may very well have to engage in decisional bargaining, and the ALJ was correct in so finding. At a minimum, the Company was obliged to comply with SPEEA's March 27, 2014 information request so that SPEEA could determine whether it is appropriate to demand decisional or effects bargaining.

Boeing attempts to buttress its exceptions with new evidence and arguments not made at trial before the ALJ. They are unavailing. Boeing cites new evidence in its brief concerning its exceptions; the brief discussed Article 2 of the CBA as a basis for finding waiver. However, Boeing did not make this argument to the ALJ at trial and has waived it for appeal. The new citations to Board law provide no support to Boeing's position. Boeing relies on cases in which the parties' CBAs expressly granted a management right that precluded bargaining. *Ingham Reg'l Med. Ctr.*, 342 NLRB 1259 (2004) (ALJ, holding that "discuss" and "bargain" were not synonymous, found Union waived right to decisional bargaining by virtue of language in the parties' CBA, which stated that employer reserved right to subcontract work ordinarily performed by bargaining unit employees after "discussion" with Union regarding the decision and impact); *Chemical Solvents Inc.*, 362 NLRB No. 164 (2015)[24] (Respondent retained right to "transfer any or all of its work to any other entity").[25] No such provision exits in the CBA between SPEEA and Boeing.

---

[23] *See Dubuque Packing*, 303 NLRB 386 (1991) *enf'd* 1 F.3d 24 (D.C. Cir. 1993).

[24] Concerning Boeing's citation to *Chemical Solvents, Inc.*,[24] on August 24, 2015, the Board reversed the ALJ's finding in part, and held that the employer "violated Section 8(a)(5) and (1) by failing to furnish certain information . . . that related to the Respondent's motive for deciding to subcontract the driving work." *Chemical Solvents, Inc.*, 362 NLRB No. 164 (2015).

[25] Boeing's citation to *California Pac. Med. Ctr.*, 337 NLRB 910 (2002) offers no guidance because the Charging Party challenged the employers right to lay off employees without engaging in decisional bargaining.

Similarly, there is no evidence supporting a conclusion that some past practice waived SPEEA's right to this information. "There is no evidence in the record demonstrating the parties' mutual understanding in the past that the Respondent need not provide the requested information, and the Respondent has not referred us to contractual language containing a waiver or any other persuasive evidence that the Union waived this statutory right." *Fairmont Hotel Co.*, 304 NLRB 746 (1991); *see also Chemical Solvents, Inc.*, *supra* (employer required to produce information despite waiver of bargaining rights).

While not necessary to finding a violation, SPEEA did not waive its right to bargain over either these decisions to move work or their effects. "We do not believe the Union's past practice constitutes acquiescence to the Respondent's violation of the contract provision. In any event, as Board precedent makes clear, a union's acquiescence in previous unilateral conduct does not necessarily operate *in futuro* as a waiver of its statutory rights under Section 8(a)(5)." *E. R. Steubner, Inc*., 313 NLRB 459 (1993).

V. CONCLUSION

The Charging Party respectfully requests that the Respondent's exceptions be denied and that the ALJ's decision be affirmed in its entirety.

Dated this 25th day of August, 2015.

Respectfully Submitted,

/s/ Thomas B. Buescher
Thomas B. Buescher
tbuescher@laborlawdenver.com
M. Jeanette Fedele
jfedele@laborlawdenver.com

There, the employer had a management rights clause similar to that in the SPEEA/Boeing CBA in that the employer had broad rights as to making decisions concerning layoff and consolidation of facilities to effect such layoffs. *California Pac. Med. Ctr*. did not address the dispute at here – whether the company may assume that the rights expressly agreed to concerning the ***reduction*** of work applies when there is no reduction of work, but only a ***relocation*** of the work.

Buescher, Kelman, Perera & Turner, P.C.
600 Grant Street, Suite 450
Denver, CO 80203
303-333-7751

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the **CHARGING PARTY'S BRIEF IN OPPOSITION TO RESPONDENT/EMPLOYER'S EXCEPTIONS** was served upon the parties via Electronic Mail, this 25th day of August, 2015, properly addressed to the following:

Richard B. Hankins
Counsel for Respondent The Boeing Company
1230 Peachtree Street, NE, Suite 2100
Atlanta, GA 30308
rhankins@mckennalong.com

Patrick Berzai
Counsel for the General Counsel
915 2nd Avenue
Room 2948
Seattle, WA 98174
patrick.berzai@nlrb.gov

Ronald K. Hooks
Regional Director, Region 19
915 2nd Avenue
Room 2948
Seattle, WA 98174-1078
ronald.hooks@nlrb.gov

Ray Goforth
SPEEA
15205 5nd Ave., South
Seattle, WA 98188
rayg@speea.org

Richard Plunkett
SPEEA
15205 52nd Ave., South
Seattle, WA 98188
richp@speea.org

s/ Antoinette Vega